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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/707,674

12/31/2003

Douglas R. WARE

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1673

28694 7590 05/09/2007  
NOVAK DRUCE & QUIGG, LLP  
1300 EYE STREET NW  
SUITE 1000 WEST TOWER  
WASHINGTON, DC 20005

EXAMINER
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LILLING, HERBERT J

ART UNIT	PAPER NUMBER
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1657

MAIL DATE	DELIVERY MODE
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05/09/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/707,674	WARE ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	HERBERT J. LILLING	1657	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 26 March 2007.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-29 is/are pending in the application.
- 4a) Of the above claim(s) 6-8 and 16-29 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5 and 9-14 is/are rejected.
- 7) ☒ Claim(s) 15 is/are objected to.
- 8) ☒ Claim(s) 6-8 and 16-29 are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>March 27, 2007</u> .  | 6) <input type="checkbox"/> Other: _____                          |

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1. Receipt is acknowledged of the amendment and deposit information filed March 26, 2007.

2. Claims 1-29 remain pending in this application.

Claims 30-41 have been cancelled.

3. The rejection of pending claims 1-29 under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement comprising *Lactobacillus acidophilus* microorganism selected from the group consisting of M35, LA45, LA51, L411, NPC 747, NPC 750, D3, and L7 has been withdrawn in view of the submitted availability of the microorganism.

4. Claims 6-8 and 16-29 have been withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to nonelected species, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on August 28, 2006.

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-5 and 9-14 drawn to the elected species are rejected under 35 U.S.C. 102(b) as anticipated by Abstract of Winkowski et al "Appl. Environ Microbiol 1993 August 59(8) 2552-2557 [for claims 1, 2, 5, 11-13] or Pidcock et al "Int. Jour. Food Microbiol 76 (2002) 75-81 [claims 1-5 and 9-14].

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-5 and 9-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Abstract of Winkowski et al "Appl. Environ Microbiol 1993 August 59(8) 2552-2557 [for claims 1, 2, 5, 11-13] or Pidcock et al "Int. Jour. Food Microbiol. 76 (2002) 75-81 [claims 1-5 and 9-14] if there are any difference with respect to the lactic acid microorganism, application of the microorganism, the selection of multiple microorganisms and the pathogen which are considered to be prima facie obvious based on the disclosure of the prior art.

7. Claim 15 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims which would include all pending claims.

8. **No claim is allowed.**

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9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner Lilling whose telephone number is 571-272-0918 and Fax Number is **571-273-8300**, or SPE Jon Weber whose telephone number is 571-272-0925. Examiner can be reached Monday-Friday from about 7:30 A.M. to about 7:00 P.M. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0196.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

H.J.Lilling: HJL  
(571) 272-0918  
Art Unit **1657**  
May 04, 2007



Dr. Herbert J. Lilling  
Primary Examiner  
Group 1600 Art Unit 1657